

Islamic Law and the Transfer of European Law

by Richard Potz

The question of external influences on Islamic law arises in particular with reference to the time it first emerged and to the reform movements of the last two centuries. During its formative phase Islamic jurisprudence drew on various sources, creating an impressive and quite independent legal system whose origins are in many cases not visible anymore. The reform movements, which started in the 18th century, were due on the one hand to external impulses from Europe, but could on the other hand also draw on native traditions. Modern Islamic law, however, which developed during the 19th and 20th centuries, still faces a struggle to this day when it comes to its legitimation, precisely because of Western influences.

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Introductory Remark

In the following, "Islamic law" – despite the unclarities of the term¹ – will refer to the legal system which was developed during the first four centuries of Islamic history and in principal was continuously in use until the second half of the 18th century.

▲1

Since the 17th century there have been reform movements which were due, on the one hand to external impulses from Europe but which were able, on the other, to draw on native traditions. During the 19th and 20th centuries this led finally to the formulation of a modern Islamic Law, which, however, still faces a struggle because of its legitimation. Within the internal Islamic debate this is particularly true for the attempts at codifying family and inheritance law and the formulation of a modern Islamic commercial law.

▲2

A fundamental point to be borne in mind is that, compared to other religions, legal aspect plays a very large role in Islam. Thus when differentiating between different schools of thought within Islam, administrative-legal differences take centre stage (theories of the Caliphate² and Schools of Law), while Christianity places more weight (at first sight at least) on theological discourse and the differentiation here is according to denomination.

▲3

The Origins of Islamic Law

Although the Qur'an – unlike for example The New Testament – contains rules of conduct in ca. 500 of its 6,237 verses, it is far from being a code of law. Firstly, the majority of these verses are instructions regarding rituals while only a

small number refers to subjects of civil and criminal law. Secondly, even the latter are presented as ethical duties and only in some exceptions, and only with reference to a small number of subjects, are they expressed in a more legally defined language.

▲4

Today there is a wide consensus within academic literature that during the early days of Islam legal problems were addressed by drawing on existing legal systems. However – and this is typical of the formative phase of religious laws – as time went on an increasing number of questions concerning rules and regulations arose. As a result, the existing legal systems were step by step supplemented and overarched by rules derived from Qur'anic revelations and from Muhammad's actions and words.

▲5

Regarding the prophetic tradition there were two schools of thought, which were not, however, clearly distinct from one another. While the *ahl al-ra'y* as "people of the individual opinion" supported independent reflection, the *ahl al-hadith* ("people of hadith") strictly adhered to the Prophet's acts and words, whose authenticity thus became a fundamental issue and theologians and law scholars developed criteria to prove this authenticity. These criteria do not meet modern academic standards, and consequently the discipline of Hadith criticism appeared on the scene in the 20th century. The radical position, represented above all by Ignaz Goldziher (1850–1921) (→ Media Link #ac) and Joseph Schacht (1902–1969) (→ Media Link #ad),³ stated that only from the second Islamic century onwards one can speak of Islamic law, and that consequently the majority of Prophetic traditions must be seen as later fabrications, and, therefore, falsifications. Nowadays the majority of Islamic scholars reject this radical position. It has been pointed out that already in the 1st century people would recur deliberately to the Qur'an and to the Prophet's own rulings as legal sources, even if this did not have quite the extent it would later assume.⁴ There is undoubtedly a certain continuity of the subject matter, even though modern scholarship regards the majority of traditions attributed to the Prophet as being apocryphal.⁵

▲6

The attempts to make legal practice correspond to the ethical principles of the Qur'an and to Prophetic tradition had several consequences. On the one hand law that was legitimised in this way also became sacralised. On the other hand, this development increased the juridification of the evolving religion of Islam. Thus Islam was and is open to all the dangers typically besetting ideal legal models with religious legitimation in their struggle with the realities of society.

▲7

Prophetic tradition (*sunna*) and Qur'anic instructions were joined together into primary Islamic law, the *Sharī'a*, in Sunni Islam. Methodological advice for the determination of further laws (*ijmā'*/consensus and *qiyās*/analogy) based on the *Sharī'a*, is traditionally included in the primary legal sources; this is not, however, entirely uncontested.⁶ As regards the consensus the question arising is – as in Christianity – who must be party to the finding of a consensus and, above all, what is the importance of the community of the faithful as the acting subject? There is a general need for rules which determine how the consensus may be reached – in the Christian tradition for example by a synod – and institutionalised. Furthermore the admissibility of analogy and other lines of legal reasoning is not supported by all schools of law.⁷ Other means of interpreting laws and developing them further are even more contested within Islam, such as *istihsān* (which essentially comprises derivations of general principles of law and rulings in a conflict of norms) and *istilā'* (consideration of the common good). Because of their decisionist emphasis, these legal instruments were the reason why until today an extreme consideration of the facts and circumstances of individual cases will be called "Kadi's justice" in legal methodology.

▲8

Based on primary Islamic law thus evolved and the methodological instructions it includes,⁸ the science of *Fiqh* (insight, understanding) was developed from the end of the 8th century onwards. The norms obtained in this way are seen as the product of systematic human endeavour. Schools of law began to take shape, determined by their respective local traditions, and also showing different methodological traits. The 9th century saw the compilation and composition of extensive collections of laws and legal textbooks in the Byzantine style; probably at the caliph's initiative. These works not only resulted in a systematic approach to the law, but eventually in the long run paved the way for leading scholars to declare the finding of justice out of their own endeavours concluded (closure of the gates of *ijtihād*). Despite the fact that in practice Islamic law remained a law of scholars and judges and consequently relatively flexible, its theory had

thus received its final form. From the point of view of the comparative history of law (→ Media Link #ae) it is remarkable that it was also between the 10th and 13th centuries that the law of the various Eastern Churches as well as Jewish law achieved their definitive collections and textbooks of laws.⁹ We should not dismiss the possibility that Islamic law may have been something of a model here, or that there was a practical need for collecting the laws in use among the Christian and Jewish minorities within Islamic territory.

▲ 9

Like all religious laws, Islamic law contains rules for the relationship between the faithful and their God (*'ibādāt*) and rules for the relations of people among themselves (*mu'āmalāt*). While a revolutionary development in the wake of an institutional and political division of powers led to the differentiation between these two spheres of law in the West, determining Western legal history since the High Middle Ages,¹⁰ no similar development has taken place in Islam. When it comes to a transfer of laws (→ Media Link #af), the fact that law and religion are so closely intertwined within Islam would naturally prove a hindrance to any transfer in either direction between Islamic and European Law far into modern times.

▲ 10

Early Influences on the Emerging Islamic Law

The origins of Islamic law have become a central topic within Islamic jurisprudence and Islamic Studies. As the development of Islamic law extended over nearly three centuries, the question arises on which sources it drew during this time. Emerging Islam had been confronted with a Syro-Christian, respectively Arabo-Christian, environment which rejected the divinity of Jesus and, therefore, the dogma of the Trinity (→ Media Link #ag). This has led to much speculation in recent times as to how much the strictly monotheistic Islam was originally embedded in these Christian surroundings¹¹ and what consequences this might have had for the origins of Islamic law.

▲ 11

While it is hardly possible to agree with these theories, there is no doubt that the revelation attributed to Muhammad (ca. 570–632) (→ Media Link #ah) has its roots in the Judaeo-Christian Biblical tradition. It is, then, no surprise that this connection is also demonstrated in the Qur'an's ethical principles and instructions, which thus fit into the entire Near Eastern tradition.¹²

▲ 12

Another stratum of law has its origins in ancient Arabian customary law. It contributed not only tribal instruments of order and conflict resolution to Islamic law, such as the "tribal council" (*shūrā*) and the consensus-oriented resolution of quarrels with the aid of a mediator (a role which has been attributed to Muhammad in Medina), but also customs of the Meccan merchants and the rather rural community in Medina.

▲ 13

However we regard the importance of Syrian Christianity in the "dark beginnings", it is a possible source for transfers of law. In this context, academic literature often refers to the Syro-Roman Book of law, which was written during the second half of the 5th century, probably in Antiochia,¹³ and which was widely received in the entire Christian Orient. Its basis in Roman law has been demonstrated clearly,¹⁴ but its place in near-Eastern legal history and its *Wirkungsgeschichte* (history of effect) are still disputed – in particular with reference to the emerging Islamic law.

▲ 14

Here we touch on the question of the influence of Roman law on Islamic law: a topic that has stirred the emotions ever since Joseph Schacht's *The Origins of Muhammadan Law* appeared in 1950. There has been a marked increase in the number of studies on the subject in more recent times. An especially instructive example is the question of early Islamic patronage, i.e. the relationship of the former owner and his freed slave.¹⁵

▲ 15

The Byzantine and Sassanid influence on the administration of the emerging Islamic empire is undisputed in scholarly lit-

erature. In addition, in an extensive study of 2007, Benjamin Jokisch (→ Media Link #aj) indicated a further, most remarkable process of reception which goes beyond these influences: he shows the noticeable parallels between the monumental book of law by al-Shaybānī (749/750–805), one of the founders of the Hanafi school of law who occupied important positions during the reign of Caliph Hārūn al-Rashīd (ca. 763–809) (→ Media Link #ak), and the Justinian compilation and code of law: "The state jurists Shaybānī and Abū Yūsuf produced an imperial code which consisted of six parts ... The code was presented as part of the Islamic-Arabic tradition and intended to be more or less binding for the Muslims in the Caliphate." And further: "The imperial code was largely based – both in structure and in content – on Roman law (*Digestsumma* of the Anonymos and the *Glosse* of Enantiophanes), but to some extent also on Jewish law, Canon law and other rulings which had been developed in Islam before the codification."¹⁶ This theory ensures that the discussion of extra-Islamic sources of Islamic law will not be concluded for some time. Jokisch furthermore presumes that the confrontation with Islamic law not only initiated the Western "re-discovery" of Roman law in the 11th century, but that also and in particular the latter's scholastic scientification through the connection with Aristotelian logic can be traced back to Islamic models. Consequently, Jokisch continues, nearly every literary genre of mediaeval "learned law" could already be found in the writings of Islamic jurists.¹⁷

▲ 16

Medieval and Modern Influences

During the Middle Ages, possible zones of contact between Islamic and Western laws were the crusader states, commerce with Italian cities, and Sicily and Spain. As for the crusader states, Arabic sources report – besides much that is negative – unrestricted trade relations and the stability of the law that prevailed there.¹⁸

▲ 17

The most important medium of European-Islamic transfer of law were the treaties between Muslim rulers and Christian naval powers. These treaties developed a kind of Mediterranean naval trade law that was based on pre-Islamic law, but was developed further by Islamic law in a most remarkable fashion.

▲ 18

With the adoption of Byzantine institutions by the expanding Ottoman Empire in the 13th century a new era of transfer of law began.¹⁹ In none of the other Islamic empires of early modern times was law-making influenced so much by the ruler as in the Ottoman Empire – this fact alone shows that the Ottoman Empire was shaping itself in this regard on imperial Byzantine models.²⁰ Sultan Süleyman I (ca. 1494–1566) (→ Media Link #al), in the West known as "the Magnificent", was given the name al-Qānūnī (the law-giver) in Islamic tradition because of his commitment to legal matters. It must, of course, be taken into consideration that classical Islamic law – despite the attempts, mentioned above, of a codification of the imperial law under Hārūn al-Rashīd – does not acknowledge any human legislative authority and that the Ottoman Sultans' "legislation" was in theory restricted to the ruler's authority to enact supplementary laws in the fields of political system and imperial administration. Similar to the privileges granted by Western rulers in the Middle Ages, the claim to validity of the Sultans' regulations would, at first, only outlive the respective ruler if his successor confirmed them. The claim of their purely supplementary nature, however, frequently turned out to be "pious fiction".²¹ Under Süleyman the activities of the Qadis were furthermore linked more closely to the Sultan who appointed them, in order to unify the jurisdiction and thus improve the stability of the law.²² In this context it is remarkable that it was not the term *nomos*, which referred to state law, but the term for ecclesiastical law, "canon", that was adopted from the Byzantine legal terminology into Arabic (*qānūn*) to denote the "supplementary" state legislation as distinct from the Sharia. Since the time of Mehmed II (1432–1481) (→ Media Link #am) this legislation was collected in codes (*qānūnnāme*).²³

▲ 19

The areas of the law which experienced the strongest Byzantine influence are, according to the academic literature, finance administration²⁴ as well as the organisation of rural affairs and urban crafts and trades.²⁵ In a transfer of laws that was very important for the organisation of the Empire, essential elements of the early 12th-century Byzantine *pronoia*²⁶ were adopted into the Ottoman *timar* system from the 13th century onwards.²⁷ This was a feudal tradition considerably different from the Western feudal system. Together with the adoption of elements of the *dhimmi* concept it would later inform the system of the Austrian Military Frontier. Another remarkable transfer of law took place with the adoption of Saxon mining law, especially in the mining districts in the Balkans, where it was known as *kanun-i-sas*.²⁸

▲ 20

"Capitulations" were another route for the transfer of Western law into the Ottoman Empire at the beginning of modern times. Süleyman entered into the first capitulations in 1536 with the French King Francis I (1494–1547) (→ Media Link #an). They were modelled on the mediaeval Mediterranean naval commerce treaties, and they were not only diplomatic and military treaties – directed against the Emperor Charles V (1500–1558) (→ Media Link #ao) – but they gave the French king a guarantee for the protection of Christian communities in the Holy Land. From the Ottoman point of view, formally the capitulations were not treaties between equal partners, but privileges granted by the Sultans, and the payments and military services rendered by European rulers were consequently regarded as tributes. As, therefore, the aim of the treaties was not reciprocity, and European states did not, at first, grant similar rights to Ottoman merchants, the latter suffered severe disadvantages in international trade. The system of capitulations survived into the 20th century: in Turkey until 1914, or rather until the treaty of Lausanne in 1923. In Egypt the Capitulatory powers maintained until 1949 so-called Mixed Courts for the Egyptians under their protection.

▲21

Modern Islamic Law and European Influence During the 19th and 20th centuries

Reform and Codification

The history of modern Islamic law has been shaped by a wide range of reception processes; which is why various authors compare the last two centuries to the formative phase of Islamic law during the first two centuries of its history.²⁹ Probably the most relevant aspect of this Modern European transfer of law was and is the adoption of the concept of comprehensive codifications which not only created supplementary laws but also included Sharī'a law.³⁰ This was a radical change from a case law to a statute law, putting Islamic law in danger of losing the flexibility typical of case law.³¹

▲22

The reception processes linked to these codifications in Islamic society can be classified according to two aspects: firstly the impulse that set them in motion, and secondly the concept they pursued.

▲23

The initial impulses of reception processes were external pressures to implement reforms, as in the case of the Ottoman reforms of the 19th century, or direct changes imposed by the colonial power, of the kind found until the end of the colonial era (→ Media Link #ap) in nearly all states with Islamic tradition, or, finally, an internal call for reforms, heard after the Second World War in most of the states that had recently acquired political independence.³²

▲24

As for the contents, there are three different types overlapping each other. The goal would have been either a codification of Islamic law, a reception of the complete contents of a foreign law, or a cross between the two. What all three ideal types have in common is that they are all influenced by the European idea of codification and the legalistic methods associated with it.

▲25

A general rule applicable to these codifications is that the areas most strongly regulated by the Qur'an, and consequently the most hallowed, were included last and within codes of – sometimes more, sometimes less – Islamic emphasis. These are the areas of law on persons, family law, inheritance law and foundation law. In this context it is most remarkable that not even traditionalists demand a return to the case law but rather "the codification of Islamic normativity", i.e. "positivising" the Sharī'a by means of the adoption of a Modern Western concept.³³ Thus, while classical Islamic law was organised with a view to theory and methodology and consequently allowed diversity of content, current Islamisation of the law is characterised by the intention of creating a higher level of coherence, with the aid of a Western methodological concept. Islamic law that has not been codified in this way is nowadays usually referred to only in cases of legal loopholes.³⁴

▲26

The decree of the legislator has definitely become the basis for the validity of Sharī'a regulations as well.³⁵ In this con-

text it is nothing less than consistent if (legal) positivism is rendered fruitful in the course of this reception: The religious commandment of obedience to Allah as a transcendental basis for the validity of the law moves functionally closer to Kelsen's³⁶ basic norm.³⁷

▲ 27

Reforms in the Ottoman Empire and in Turkey

The European reforms of the Ottoman Empire began with the accession of Sultan Selim III (1762–1808) (→ Media Link #aq) in 1789, taking the form of early steps towards a modernisation of the imperial administration after the Western model. Sultan Mahmut II (ca. 1784–1839) (→ Media Link #ar) continued the reformist endeavours, one of which was the abolition of the *timar* system, begun in 1831.

▲ 28

With Mahmut's death began the so-called *tanzimat* (reorganisation) period which took place during the rules of Abdülmecid I (1823–1861) (→ Media Link #as) and Abdülaziz (1830–1876) (→ Media Link #at) and during which, under pressure from the great European powers, further profound reforms were undertaken. It started with the *Hatt-ı Şerif* of Gülhane on 3 November 1839, and ended with the adoption of the first Ottoman constitution based on a Western model in 1876. At the core of the reforms were the gradual abolition of the absolutist system, the introduction of a ministerial system, equality of all citizens before the civil law independently of their religion, as well as reforms of financial, legal and army administration after the European model.

▲ 29

The first reception, or rather adoption, of a Western code of law took place in 1850, with the partial adoption of the French *Code de commerce* of 1810, followed in 1858 by a criminal code which was in most parts a translation of the French *Code pénal Impérial* of 1810, but which also contained some regulations according to Islamic law. 1879 saw the enactment of procedural rules, again based on French models.

▲ 30

Among the codes based mainly on Hanafite *Fiqh* were the law on land rights (1858), but above all the *Mecelle*, promulgated from 1869 onwards, which was a code of civil law comprising law of obligations, property law and procedural law. It was not possible at first to come to an agreement with regards to family, inheritance and foundation law. The codification of family law that did take place in 1917 did not, however, achieve practical importance in Turkey but only in some successor states of the Ottoman Empire – for the longest time in Israel and Lebanon.

▲ 31

The constitution in the Western style enacted on 23 December 1876 was repealed by Sultan Abdülhamid II (1842–1918) (→ Media Link #av) after the outbreak of the Russo-Turkish war (1877/1878). During these years of "neo-absolutist" rule, reforms continued to be introduced from the top.

▲ 32

Turkey has been able to build on many of the reforms of the Ottoman Empire and, in the Kemalist revolution, took a firm step towards the radical Europeanisation of its law. The first republican constitution was enacted on 20 April 1924 (*Teşkilât-ı Esasiye Kanunu* – "Law of the basic organisation"), replacing the constitutional provisions of 1876 and 1921. With some changes, it remained in force until 20 July 1961. The most radical step of reception of law in any state with an Islamic tradition was taken in 1926, when Turkey completely adopted the Swiss civil code and the Swiss law of obligations.

▲ 33

Legal Developments Under Colonial Rule

One consequence of colonialism and the incorporation of Muslim countries into European states, were processes of reception and adoption determined by the law of the respective colonial power.

After the acquisition of sovereignty by the East India Company in 1772, the Anglo-Muhammedan law emerged as the most important European-Islamic mixed legal system, at first including civil and criminal law. Many of the codes of criminal, contract and procedural law that were issued during the 19th century showed English influences. Thus, a comprehensive criminal code put an end to the application of Islamic criminal law in India in 1860. In the field of personal law, codification did not take place until 1937 in the Muslim Personal Law Application Act. Probably the most important consequence of the Anglo-Muhammedan law was the increased employment of Muslim judges who had been trained in English law and who would apply the Islamic law increasingly according to the example set by English case law.

▲ 35

In Arab countries the concept of codification took hold mainly under French influence. After the French legal system had been adopted in Algeria as early as 1834, the beginning of the 20th century saw impressive codifications which combined French and colonial law. Here we must emphasise the *Code Tunisien des Obligations et des Contrats*, promulgated in 1906, the so-called *Code Santillana*. A similar codification, drafted in Algeria in 1916, the *Code Morand* did not come into effect. There was no comparable legislation in Morocco at the beginning of the 20th century, and later on Morocco has stayed more closely linked to its indigenous traditions than the other two Maghreb states.

▲ 36

As a third example we should like to mention the Austro-Hungarian administration of Bosnia and Herzegovina, where a semi-colonial system was introduced after the occupation in 1878. At first this system had to take into consideration that the two provinces had formally remained part of the Ottoman Empire. However, an internal legal policy did emerge over time.³⁸ Thus the reform of the legal status of Islam was modelled on the Austrian ecclesiastical law, with the consequence that to this day the organisation of Bosnian Islam is noticeably "church-like". The jurisdiction remained divided as far as the training of judges and the organisation of courts went, but the state organised Islamic Sharī'a courts were approximated to European standards. Once Bosnia became, with the annexation of 1908, part of the Austro-Hungarian Empire under constitutional law, the colonial elements became fewer still.

▲ 37

Modern Islamic Law in Post-Colonial Times

After the Second World War a veritable wave of codification took place, in the Arab states in particular. Law codes were mostly determined by internal pressure to implement reforms, with a synthesis of Islamic and Western traditions, weighted differently in different countries, as their aim.³⁹

▲ 38

As a consequence of this development nearly all the states of the Islamic world have formal constitutions nowadays.⁴⁰ In most cases these do, however, contain references to Islam as the state religion, or the constitution refers to Islamic law as the source of law and basis of the legislation.⁴¹ In addition, regarding the basic rights we frequently find Sharī'a-based provisos (for example in article 11 of the Egyptian constitution which guarantees the equality of men and women). Similar Sharī'a-based provisos, by means of which certain basic rights (such as the right to change one's faith or conviction) are *a priori* excluded from the protection of basic rights with reference to Sharī'a commandments, are also characteristic of Islamic declarations of human rights. The considerations necessary to decide the limits of basic rights do not take place at all, devaluing these declarations from the first.

▲ 39

As regards civil law, after the First World War we find legislation in the core areas of the personal law in Egypt in particular. The Egyptian civil code of 1949 would turn out to be of particular importance, and because of the great recognition it achieved in the Arab world (Iraq, Libya, Sudan, Algeria, Kuwait, Syria) became indeed the nucleus of an Arab-Islamic legal family (→ Media Link #aw). While its author, the Egyptian jurist al-Sanhūrī (1895–1971) (→ Media Link #ax) emphasises that Islamic law was taken into consideration throughout,⁴² in actual fact this most accomplished code shows a strong influence of French law. Furthermore, family law and inheritance law are not included, as these areas continue to be within the purview of religious law which, however, has been applied in Egypt since 1955 by the state

Besides the concept of codification the most important influences the Western approach to legislation has had on states with Islamic tradition are the academic education of judges and measures to ensure the independence of judges; furthermore in the areas of procedural law and the organisation of the courts, especially the introduction of a sequence of courts (and consequently stages of appeal). In this context it is important also to mention the constitutional jurisdiction according to the Western model which has been developed to a remarkable high standard, in particular in Egypt (since 1978).⁴³

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Appendix

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Notes

- ¹ Unfortunately it is not possible within the limits of the present study to discuss the phenomenon, known in other legal systems as well, that when it comes to law in action, the justification of verdicts based on their compliance with Islamic law was often established *a posteriori*, and that consequently the individual Islamic law valid in any one case is not so easily determined.
- ² As Muhammad did not arrange a succession, the question of who should lead the Islamic community became a major problem after his death, even leading to military skirmishes between the separate groups and, ultimately, to the division into two main branches. Since the Prophet had made no decision in this regard, the Sunni majority appointed a successor/deputy ("caliph") from the closest circle of the Prophet's companions, while the Shi'ī minority

referred to a tradition according to which the Prophet had appointed his son-in-law Ali his successor whose subsequent successors were the Imams.

3. ^ Schacht, Introduction 1964.
4. ^ Motzki, Anfänge 1991, p. 262.
5. ^ Cf. Rohe, Recht 2009, p. 57.
6. ^ Cf. Krawietz, Hierarchie 2002, esp. p. 182ff.
7. ^ Rohe, Recht 2009, p. 62ff.
8. ^ Johansen calls this fundamental "Islamic normativity", Johansen, Erbe 2002, points 2 and 3.
9. ^ Cf. Potz, Synthetic Report 1994, p. 596ff.
10. ^ Comprehensively on this subject: Berman, Recht 1991.
11. ^ Cf. Ohlig, Christentum 2006.
12. ^ Cf. esp. Mallat, Introduction 2007, esp. p. 15ff.
13. ^ Cf. Selb / Kaufhold, Syrisch-römisches Rechtsbuch 2002, p. 49f.
14. ^ Concerning the academic history of this subject cf. ibidem, pp. 27–42.
15. ^ Crone, Law 1987; Mitter, Patronat 2006.
16. ^ Jokisch, Law 2007, p. 619.
17. ^ ibidem, pp. 625, 611ff.
18. ^ Cf. the famous account of the Arab travel writer Ibn Jubayr (1145–1217) from the time of the Third Crusade, who emphasises the legal certainty existing in the Kingdom of Jerusalem in the 12th century which extended to Muslims as well (edited and translated by Broadhurst, Roland J.C.: The Travels of Ibn Jubayr: being the chronicle of a mediaeval Spanish Moor concerning his journey to the Egypt of Saladin, the holy cities of Arabia, Baghdad the city of the Caliphs, the Latin kingdom of Jerusalem, and the Norman kingdom of Sicily, London 1952).
19. ^ Cf. esp. Vryonis, Legacy 1969/1970.
20. ^ Cardini, Europa 2000, p. 203.
21. ^ Schacht, Problems 1960, pp. 103, 110.
22. ^ ibidem.
23. ^ Cf. Koç, Law 2005, p. 78ff.
24. ^ Vryonis, Legacy 1969/1970, p. 276ff.
25. ^ ibidem, p. 280.
26. ^ The *pronoia* was a kind of fief for military service, which was granted the status of an administrative and tax unit. The concept differs from Western feudalism in its centralistic orientation towards the ruler (no "pyramid" of fiefs) and in the fact that it did not include comparably close personal relationships between the giver and the receiver, but on the other hand there were no bonded peasants, either.
27. ^ Vryonis, Legacy 1969/1970, p. 273ff.; Inalcık, History 1994, p. 167.
28. ^ Vryonis, Legacy 1969/1970, p. 279.
29. ^ Cf. esp. Coulson, History 1964.
30. ^ "Modern Islamic legislation is an important, if it is not the most important, manifestation of Islamic modernism, of modern thought in Islam", Schacht, Problems 1960, p. 99.
31. ^ In a comparison of religious laws this recalls clearly the discussions concerning the codification of Catholic ecclesiastical law beginning in the second half of the 19th century. At first, conservative circles opposed the "rationalistic concept" of a codification and deplored that stricter adherence to the law would result in the restriction of ecclesiastical officials' ability to achieve justice in individual cases as an act of grace (which, of course, also included a risk of arbitrary decisions). Once the Canonical Code (*Codex Iuris Canonici*) had come into force in 1918, however, the tide turned as from then on conservative Catholic circles made it their aim to adhere to this codification which supported the papal assertion of the right to legislate and to maintain the stringency of the statutory law.
32. ^ Cf. Hill, Study 1978, p. 286ff.
33. ^ Johansen, Erbe 2002, point 3.
34. ^ Such as for example in Art. 1, paragraph 2 of the Egyptian Civil Code of 1949; cf. more generally Liebesny, Law 1953, S. 499f.
35. ^ Anderson, Trends 1971, p. 18.
36. ^ The basic norm serves as the condition (in the sense of transcendental logic) which guarantees the self-contained nature of a legal system. In Kelsen's opinion, the search for the basis of validity of a norm must end with the one norm which is presupposed as the last, and highest norm. Being the highest norm it must be presupposed as it cannot have been decreed by an authority which would have to be dependent on an even higher one (cf. Kelsen, Reine Rechtslehre 1960, p. 197). For reasons of economy of thought, in Kelsen's view the basic norm (which would thus be determined hypothetically or notionally) would arise out of the overall effectivity of a legal system.
37. ^ Cf. Nyazee, Jurisprudence 2003, and Moosa, Allegory 1998.
38. ^ Cf. the comprehensive study by Schmid, Bosnien 1914.

39. [^] Cf. Hill, Study 1978, p. 284ff.
40. [^] Cf. Ebert, Interdependenz 1991, passim.
41. [^] Cf. for example Art. 2 of the Egyptian constitution of 1971.
42. [^] Cf. Hill, Study 1978, p. 303.
43. [^] Moustafa, Law 2003.
44. [^] I am indebted to Rüdiger Lohlker for some valuable comments.

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